

Malik (Migration) [2018] AATA 3593 (23 August 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Salman MALIK
CASE NUMBER:	1618598
DIBP REFERENCE(S):	BCC2015/686719
MEMBER:	Shane Lucas
DATE:	23 August 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 23 August 2018 at 2:59pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Whether a genuine spousal relationship exists – Parties declined to attend hearing – Limited evidence before the Tribunal – No evidence of pooling financial resources – No evidence of joint household responsibilities – Limited evidence of the social aspects of the relationship – Limited evidence of the commitment of the parties – Decision affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2, cls 820.211(2)(a), 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 20 October 2016 to refuse to grant the visa applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant is a national of Pakistan born on 30 August 1991. He applied for the visa on 3 March 2015 on the basis of his relationship with his sponsor. At the time of application, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). Relevant to this matter, the primary criteria include cls.820.211(2)(a) and 820.221.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cls.820.211(2)(a), and consequently 820.221, of the Regulations because the delegate was not satisfied that the applicant was in a genuine and continuing spousal relationship with the sponsor. The delegate considered that the evidence and information provided in support of the application was not sufficient to demonstrate that the applicant satisfied the definition of spouse under sections 5F or 5CB of the Act.
4. The applicant seeks review of the delegate's decision.
5. The applicant was represented in relation to the review by a registered migration agent.
6. The applicant was invited to appear before the Tribunal on 1 August 2018 to give evidence and present arguments. On 31 July 2018, the applicant's representative wrote to the Tribunal requesting that the hearing be postponed due to a "sudden medical emergency". At the request of the Tribunal, the applicant's representative provided medical documentation attesting that the applicant was experiencing lower back pain. The Tribunal considered the documentation provided and acceded to the applicant's request for a postponement of the hearing.
7. The applicant was subsequently invited to appear before the Tribunal on 23 August 2018 to give evidence and present arguments. On 22 August 2018, the applicant's representative again wrote to the Tribunal, stating:
 8. *"Our client has instructed us that due to some personal reasons, he and his wife cannot attend the hearing as scheduled for 23 August 2018. Accordingly, the Member can make a decision on the basis of the submitted documents by our client."*
9. Given the applicant's decision to not attend the scheduled hearing, the Tribunal has received no oral evidence from the applicant or his sponsor regarding this application. However, subsequent to lodgement of the application for review on 7 November 2016, the applicant's representative provided documentation and written submissions in support of the application on 17 November 2017 and on 28 June 2018. This evidence was considered by the Tribunal in the making of this decision.
10. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

Relevant law

11. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act; there must be a mutual commitment to a shared life as a married couple to the exclusion of all others; the relationship must be genuine and continuing; and the couple must live together or not live separately and apart on a permanent basis [s.5F(2)(a)-(d)]. In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects, the nature of the parties' household, and their commitment to each other as set out in r.1.15A(3).

CONSIDERATION OF CLAIMS AND EVIDENCE

Are the parties validly married?

12. If the parties are validly married, they may meet the requirements of a spousal relationship. The applicant provided the Tribunal with a copy of a Certificate of Marriage showing the marriage was made in Lower Templestowe, Victoria on 10 December 2014. There is nothing to suggest the marriage is not valid. The Tribunal is therefore satisfied on the evidence that the parties are married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

13. Is the sponsor an eligible person?

14. Clauses 820.211(2)(a) and 820.221 of the Regulations require that at the time the visa application was made (and at the time of decision) the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, the visa applicant claims to be the spouse of the sponsor. The parties provided documentation attesting that the sponsor (born in East Melbourne, Victoria on 3 November 1993) is an Australian citizen by birth. Accordingly, the sponsor satisfies the requirements of cls.820.211(2)(a) and 820.221.

Are the other requirements for a spousal relationship met?

15. The applicant provided documentation to the Tribunal that was not available to the delegate. This information has been considered in the making of this decision.

16. Financial aspects of the relationship

17. The Tribunal received documentation and written submissions regarding the financial aspects of the relationship between the parties. The evidence included documentation regarding the couple's joint savings account with the Commonwealth Bank, and the applicant's personal transaction and credit card accounts with the same financial institution; utility and telephone bills in individual names; personal wills in the name of the individual parties, each naming the other as executor and trustee of their estate in the event of their decease; documentation in the name of the applicant naming the sponsor as beneficiary of his superannuation funds in the event of his decease; and a residential tenancy agreement in joint names regarding the parties claimed residence in Springvale, Victoria.
18. In the written submission dated 26 June 2018 made by the applicant's representative, the couple's financial arrangements were described thus:

19. *"... the Sponsor is a housewife and she never worked in paid employment for years except for a brief period last year [2017]. Accordingly, the Sponsor is entirely*

financially dependent on the Applicant and [the applicant] is responsible for paying their rent, grocery, utility bills and credit card repayments etc.”

20. The couple's joint savings account statements for the period 12 December 2017 to 11 June 2018 document a regular pattern of incomings and outgoings, such that the balance does not exceed AUD 200.02 at any point and is AUD 0.01 by the end of the period. In noting this trend, the applicant's representative submits:

21. “In this regard, the Applicant submits that their joint bank account is a Commonwealth Bank's Saver account and they only use this account just for savings purposes. Moreover, as per the bank requirements, this account cannot be used for everyday transactions as the bank does not issue a card. Therefore, the couple always uses this joint account for savings, but as the Sponsor is not working at all; consequently, it is challenging for the couple to save money at this stage of their life. Accordingly, although they put some money into their saver bank account, but again whenever the couple needs money, they withdraw from this account to pay their other responsibilities.”

22. The applicant's personal transaction account statements for the period 21 February 2018 to 20 May 2018 show various day-to-day transactions and a regular salary payment from Uber. The applicant's transaction account also lists regular credits to the couple's joint savings account, though it is noted that these amounts are almost immediately withdrawn from the savings account and transferred to another unknown account. At the applicant declined the opportunity of a hearing, the Tribunal was not provided with any oral evidence that might have confirmed the identity of the holder of this other account or the account's purpose.

23. Other than the above statement (see [15]) in the written submission by the applicant's representative, the Tribunal received no evidence as to how the parties meet their day-to-day household expenses or whether the transactions listed on the applicant's account statement pertain to the day-to-day household expenses of both parties. The Tribunal therefore gives little weight to the documentation provided in considering the basis on which the couple share day-to-day expenses.

24. The Tribunal also finds no evidence that the joint savings account maintained by the couple is actually used for the purposes of saving money. Rather, the Tribunal reasons on the basis of the documentation provided that the joint savings account is a temporary repository for funds transferred between the applicant's personal account and some other account not identified in the submissions made by the parties.

25. The Tribunal was also provided with the applicant's credit card account statements for the period 6 January 2018 to 5 June 2018. The statements show a series of transactions and a negative balance as at 5 June 2018 of AUD 6064.76. In the submission made by the applicant's representative, this debt is characterised thus:

26. “Also, the pair has an existing debt of \$6000 in the Applicant's name with the Commonwealth Bank. The Sponsor's name could not be included as she was not working at the time.”

27. The Tribunal accepts that the Applicant had an outstanding debt to the Commonwealth Bank as at 5 June 2018. While acknowledging the explanation provided by the applicant's representative as to why the sponsor is not a party to the credit account, the Tribunal was provided with no oral or other evidence that this debt is a liability shared by the parties.

28. On consideration of the evidence provided, the Tribunal finds that the parties have not pooled their financial resources, especially with regard to major financial commitments. The

Tribunal finds no evidence of any joint ownership of real estate or other major assets; and no credible evidence of any joint liabilities. The Tribunal finds some evidence – in the statements contained in the written submission made by the applicant’s representative - that the persons share day-to-day expenses, but no evidence that the sharing of these expenses attests to a genuine and continuing spousal relationship between the parties. The Tribunal finds some evidence – in the form of the joint tenancy agreement - that the persons may each owe a legal obligation in respect of the other as persons living under the same roof, but no evidence that this attests to a genuine and continuing spousal relationship between the parties. The Tribunal also finds some evidence that the persons may each owe a legal obligation in respect of the other with regard to their respective wills and the sponsor’s status as beneficiary of the applicant’s superannuation funds in the event of his decease. However, the Tribunal reasons that such documents are easily obtained and easily altered by the signatories at some future time in order to extinguish any prospective legal obligations, and hence the Tribunal finds that this evidence does not attest to a genuine and continuing spousal relationship between the parties.

29. On balance, the Tribunal gives the financial aspects of the relationship little weight in determining whether the parties are in a genuine and continuing spousal relationship.

30. Nature of the household

31. The Tribunal received documentation and written submissions regarding the nature of the parties’ household. The applicant claims that the couple lived together at a property in Cranbourne West, Victoria from the time of their marriage in December 2014 until 12 February 2018; and that they have subsequently resided together at a property in Springvale. The applicant provided the aforementioned tenancy agreement in joint names as evidence of their residence at the latter property since signing the agreement on 23 January 2018; other documentation in the form of correspondence and services received by the parties at these properties indicating that the parties have lived separately or together at the respective addresses; and a Statutory Declaration dated 11 December 2016 from the owner of the Cranbourne West property stating that the couple are husband and wife, and rented the aforementioned property from 4 January 2015.
32. In the written submission dated 26 June 2018 made by the applicant’s representative, the nature of the parties’ household is summarised thus:

33. *“The couple informed us that they previously lived together at [address withheld by the Tribunal] Cranbourne West... from the day of their marriage till 12 February 2018. They have now been living together at [address withheld by the Tribunal] Springvale... since 13 February 2018. The Sponsor advises us that she is a full-fledged housewife... and wholly responsible for cooking, house chores and other everyday household works. She further adds that although [the applicant] is working full time and primarily responsible for their household expenses, but he also sometimes cooks food for her as she loves Indian/Pakistani curries and tandoori roties and her husband is an expert in cooking Indian subcontinental food. They also do their weekly grocery together...”*

34. On consideration of the evidence, the Tribunal finds that the couple have lived together as persons under the same roof since January 2015. However, as the Tribunal received no oral or other evidence regarding the couple’s living arrangements, the Tribunal finds that the evidence provided does not attest to a genuine and continuing spousal relationship between the parties. The Tribunal finds some evidence that the couple share responsibility for housework as persons living under the same roof, but no evidence that these shared domestic responsibilities attest to a genuine and continuing spousal relationship between the

parties. The Tribunal finds no evidence of any joint responsibility for the care and support of children.

35. On balance, the Tribunal gives the nature of the parties' household little weight in determining whether the parties are in a genuine and continuing spousal relationship.

36. **Social aspects of the relationship**

37. The Tribunal received documentation, photographic evidence and Statutory Declarations from third parties regarding the social aspects of the relationship between the persons.
38. The Tribunal considered the Statutory Declarations from third parties, being members of the applicant's family in Pakistan and the couple's friendship network in Australia. The Statutory Declarations contain high-level statements and use similar phrases (e.g. "I believe the relationship of [the applicant] and [the sponsor] is genuine and continuing..."; "I know [the applicant] and [the sponsor] has a genuine relationship...") but do not provide any substantive detail or unique insights into the nature of the couple's relationship such as might be expected from persons that claim an informed knowledge of the relationship between the parties. The declarants resident in Australia claim to have visited the couple at their home and to have shared meals with them, however they only provide generalised statements regarding the interactions between the persons. As the applicant declined the opportunity to provide the Tribunal with oral or other evidence regarding the application, the Tribunal can only assess these declarations on their merits and finds them to be non-specific, repetitive and general in their observations about the claimed relationship. The Tribunal therefore gives the Statutory Declarations provided little weight in determining whether the relationship is viewed as a genuine and continuing spousal relationship in the opinion of the couple's friends and acquaintances, or whether the persons represent themselves to other people as being married to each other.
39. The parties also provided the Tribunal with photographic evidence attesting to the social aspects of their relationship. A substantial majority of the photographs are posed "selfies" of the couple taken in a motor vehicle or at an undisclosed location and do not include other persons or give any indication of the nature of the social setting. Only two photographs show the couple in the company of one other (unnamed) person. Again, as the Tribunal was provided with no oral or other evidence pertaining to the setting of these photographs, it is unable to determine their context. The Tribunal therefore gives the photographic evidence provided no weight in establishing whether the persons represent themselves to other people as being married to each other or whether the parties plan and undertake joint social activities.

40. In the written submission provided by the applicant's representative, it is stated that:

41. *"We submit that the couple is well-recognised and accepted amongst friends and family members. They together attend birthdays, events, holidays, parties and dinners, and they are known to be in a loving and long-standing relationship. Besides, the pair has been to Melbourne Zoo, Twelve Apostilles [sic], and Philip Island together. The Applicant informs us that they want to go overseas to enjoy their vacations, but due to the 'no travel' condition on the Applicant's bridging visa, they have been postponing this further and further."*

42. In support of the above claims, the Tribunal was provided with two invitations in joint names requesting that the couple attend a Sunday brunch for two other persons on 3 March [year undisclosed] and a birthday party for one other person on 24 September [year undisclosed]. The Tribunal received no oral or other evidence of the additional activities and shared travels noted in the written submission made by the applicant's representative. The Tribunal

therefore gives the documentation provided no weight in determining whether the persons represent themselves to others as being married to each other; or the basis on which the persons plan and undertake joint social activities.

43. On consideration of the evidence, the Tribunal is not satisfied that the persons represent themselves to others as being married to each other. The Tribunal finds that the couple do not plan and undertake joint social activities. The Tribunal also finds no credible evidence that the relationship is viewed as a genuine and continuing spousal relationship in the opinion of the couple's friends and acquaintances.
44. The Tribunal is therefore not satisfied that the social aspects of the relationship attest to a genuine and continuing spousal relationship between the parties.

45. Nature of the persons' commitment to each other

46. The Tribunal received documentation and written submissions regarding the nature of the persons' commitment to each other. The parties claim to have first met in May 2013 during a period in which the applicant worked as a taxi driver. The parties claim that the sponsor was initially a customer of the applicant in his work capacity, and that the persons subsequently exchanged contact details and began to see each other socially. The parties claim to have committed to a genuine and continuing relationship in January 2014, and to have become engaged to be married in August 2014. The couple were legally married on 10 December 2014 and claim to have commenced living together shortly thereafter at a property in Cranbourne West.
47. As stated above, the applicant declined the Tribunal's offer of a hearing regarding his application for review, hence the Tribunal has not been provided with oral evidence regarding the nature of the persons' commitment to each other. However, in a written statement dated 15 December 2015, the applicant stated:

48. *"Now I am really very happy with my married life and feel my self really lucky to have [the sponsor] in my life, she is really very understanding and caring wife, I am sure we will always be a happy and loving couple."*

49. In the written submission dated 26 June 2018, the applicant's representative described the nature of the persons' commitment to each other thus:

50. *"Over the more than three years and ten months of their relationship, the couple has come closer to each other, and they are now inseparable... [T]he sponsor is complete with the applicant in her life as he has brought her consistency and support. I submit that they are reliant on each other."*

51. The applicant's representative also claimed that the parties have been trying to conceive a child since October 2015, and submitted medical documentation attesting that the parties each have medical conditions that have meant these efforts have been unsuccessful. The Tribunal finds the medical documentation provided to be credible in as much as it details the medical circumstances of the individual parties. However, the Tribunal finds no evidence that these individual medical issues attest to the existence of a genuine and continuing relationship between the parties or that the parties aspire to conceiving a child together. Again, in the circumstances where the applicant declined the opportunity to appear before the Tribunal and provide oral or other evidence in support of the application, the Tribunal finds no evidence – over and above the written submission provided by the applicant's representative - attesting to the couple's stated desire to have a child together. The Tribunal therefore finds no evidence that the persons see the relationship as being long term or that the couple draw a degree of emotional support and companionship from each other.

52. On consideration of the evidence, the Tribunal is not satisfied that the relationship is of the duration claimed by the parties (i.e. that it commenced in January 2014 and is genuine and continuing at the time of this decision). The Tribunal finds no evidence that any periods of time in which the couple have lived together since January 2015 as persons under the same roof attest also to a genuine and continuing spousal relationship between the parties. The Tribunal finds no evidence that the persons draw a degree of emotional support or companionship from each other such as would attest to a genuine and continuing spousal relationship between the parties. The Tribunal finds no evidence that the persons see the relationship as a long term one.
53. The Tribunal is therefore not satisfied that the nature of the persons' commitment to each other attests to a genuine and continuing spousal relationship between the parties.

54. Other matters for consideration

55. The written submissions made by the applicant's representative argue that there are compelling and compassionate circumstances in this matter, including the potential psychological and material hardship that would be experienced by the parties should the applicant be forced to depart Australia. The submission also argues that social and political circumstances in the applicant's country of origin (Pakistan) would make the sponsor unsafe should she be required to travel to that country, given she is an Australian citizen and would be identified as a "Westerner".
56. The Tribunal notes these concerns as raised in the submission by the applicant's representative, but finds that they are not relevant considerations under the criteria for grant of this visa, as set out in Part 820 of Schedule 2 to the Regulations. The Tribunal has therefore not considered these issues in the making of this decision.

57. Conclusion

58. Having regard to all the circumstances of the relationship, the Tribunal is not satisfied that when the application was made and at the time of this decision, the applicant and sponsor had a mutual commitment to a shared life to the exclusion of others. The Tribunal is not satisfied their relationship is genuine and continuing. The Tribunal is not satisfied that the applicant and the sponsor live together.
59. On the basis of the above findings, the Tribunal is not satisfied that the requirements of [s.5F(2)(b)-(d)] are met at the time the visa application was made, and at the time of this decision. Therefore, the applicant does not meet cl.820.211(2)(a) and cl.820.221.
60. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

61. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Shane Lucas
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).